

(which themselves are competing with cable in the delivery of multichannel video programming services through their participation in DirecTV) continue to engage in pole attachment abuses toward cable operators.

⁵⁹(...continued)

reported joint venture with an alternative access provider, the utility had unilaterally changed its contract to assess a \$50-\$100 per-pole penalty on fiber attachments by cable television, a price level which made the pole rents alone greater than the tariffed rate for dark fiber. The Commission rejected that approach as contrary to the Communications Act. Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192 (1992). The FCC decision was affirmed by the D.C. Circuit. Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C.Cir. 1993).

In another recent flagrant example of electric utility abuse over pole attachments, Carolina Power and Light (North Carolina) ("CP&L") refused to allow Time Warner to upgrade its Raleigh System with fiber, demanding that the cable operator may only lease fiber capacity from the utility. After the cable operator filed a pole complaint at the FCC, CP&L brought an action for civil trespass against Time Warner, which subsequently was removed to federal court. The required fiber lease payments that CP&L demanded of Time Warner totalled \$39 million, as opposed to cable operator's anticipated one-time fiber construction costs of \$3.6 million. CP&L has also tried to amend its pole agreements to limit the kinds of services that may be transmitted over the physical attachments. Carolina Power & Light Co. v. Time Warner Entertainment Co., L.P., Civ. Action No. 5:94-CV-352-BO(3), Memorandum in Support of Defendant's Motion to Dismiss, (filed May 24, 1994).

⁶⁰The Clay Electrical Cooperative in Jacksonville, Florida recently raised its pole attachment rate charged to Continental from \$10.00 per attachment per year to \$15.85. This nearly 60% jump in the Clay Electric pole rent will have a substantial impact on Continental's operations. The abuses of the electrical coops are not isolated. The United Electric Cooperative in Pennsylvania more than doubled its pole rent to \$10.50 immediately after it began to advertise and promote DirecTV's DBS service. In addition, the Withlacoochie Electrical Coop in Florida increased its pole attachment rate applicable for Time Warner for 1994 to \$15.35 per pole, up from \$10.40 per pole in effect the previous year. When Time Warner refused to pay the new rate, Withlacoochie sued for trespass and sought an order requiring Time Warner to vacate the poles. The matter is scheduled for trial this fall. Other electrical coops operating in the same area has established an identical rate, and there is reason to believe that the coops have agreed to set the same price.

B. Recent Anticompetitive Conduct of Local Exchange Carriers

1. NYNEX⁶¹

In 1987 and 1988, NYNEX attempted to compel the Portland, Maine Police Department to arrest employees of the local cable system (Public Cable owned by Time Warner) for criminal trespass to prevent the cable operator's crews from installing fiber optic lines on cable strand for which the cable operator already had valid permits from NYNEX.⁶² NYNEX's resistance to overlashing existing permitted strand had not been an issue for many years until cable began to overlash with fiber in Portland.⁶³ NYNEX's tactics have since become both more subtle and more systematic.

NYNEX now requires all cable television companies in New England to agree to an amendment to its pole attachment contract which requires the cable company to obtain written permission from NYNEX before it can overlash fiber.⁶⁴ In a newly instituted "Automatic Licensing Procedure for Newly Placed Poles" effective November 15, 1993, NYNEX requires all cable television companies that seek to attach fiber to their coaxial cable

⁶¹NYNEX currently has the following pending video dialtone applications/authorizations: In the Matter of the Application of New England Tel. Co., W-P-C-6982 (filed July 29, 1994); In the Matter of the Application of New England Tel. Co., W-P-C-6983 (filed July 8, 1994); New York Tel. Co., 8 F.C.C.Rcd. 4325 (1993).

⁶²NYNEX Corp. v. United States, No. 93-323-PC, Affidavit of Jerome C. Ramsey, (D. Me. 1994).

⁶³Id., Letter to David Flannigan, from Thomas M. Rutledge, President Public Cable Company, Attachment D-1 to Ramsey Affidavit, (March 25, 1988); Reply Affidavit of Paul R. Cianelli.

⁶⁴Id. Affidavit of Paul R. Cianelli.

to inform NYNEX of this fact.⁶⁵

NYNEX has enforced these overlash terms throughout its service areas. In one instance, NYNEX demanded that Times Mirror, the cable operator in Warwick, Rhode Island, refrain from overlashing fiber to poles for which it already had permits until the cable operator provided specific information to NYNEX concerning construction timeframes and other matters.⁶⁶ These NYNEX actions were taken both to impede construction of new cable television fiber optic facilities, and to acquire information on the status of cable fiber builds. These NYNEX actions came on the heels of NYNEX's press conference announcing the construction of a broadband fiber optic network specifically designed to provide video services in the Warwick, West Warwick area.⁶⁷

In addition to the new fiber permitting procedures in Portland and Warwick, and the Warwick stop-work order, NYNEX also has disseminated "clarifications" of current pole agreements asserting that (1) only one coaxial cable may be attached to any strand, contrary to standard industry practice, and (2) NYNEX must be notified in advance of the attachment of fiber (but not coaxial) cable. No similar requirement is contained in the joint use agreements between telephone and power companies.⁶⁸ In the past two years, NYNEX engineering estimates for specific makeready projects have increased 120%, presumably in

⁶⁵Id.

⁶⁶Id., Affidavit of Craig Watson.

⁶⁷Id.

⁶⁸Id., Reply Affidavit of Paul R. Cianelli.

response to NYNEX's interest in providing video services.⁶⁹ NYNEX also is currently attempting to impose pole attachment rate increases on cable operators throughout its New England service area as high as 266% over the existing rate. NYNEX has added all these anti-competitive tactics to its more traditional arsenal of permit processing and makeready stonewalling.⁷⁰

NYNEX is inflicting similar abuses on cable operators in Vermont. In addition to imposing makeready delays on one cable operator dating as far back as June 1990,⁷¹ NYNEX has refused to grant attachment permits to that cable operator to link headends located in separate towns, on the pretense that the cable operator did not possess a franchise to provide retail cable service in all of the intervening towns through which the *trunk* lines would pass. The Vermont Department of Public Service has recently instituted a proceeding

⁶⁹Id., Affidavit of Gary M. Perrelli.

⁷⁰One Pole Licensee, Greater Media, has been injured considerably by NYNEX's permitting and makeready practices. Permit approval *routinely* takes 12 months and it is not unusual for Greater Media to be forced to wait far longer. There is no correlation between the permit approval waiting period and the size or complexity of the application. In one instance, Greater Media's Worcester, Massachusetts system waited for more than six months for a single makeready application covering *one pole*, which required only the lowering of a single drop line. In another case, NYNEX stonewalled for several months on processing and performing makeready needed for Greater Media to service a new development. Only after pressure from subdivision residents, and the real estate developer, did NYNEX approve the project.

⁷¹See Investigation of Proposed Vermont Price Regulation Plan and Proposed Interim Incentive Regulation Plan of New England Tel. & Tel. Co., Docket No. 5700 (Vermont Dep't Pub. Serv. 1994).

specifically to deal with these and other pole attachment abuses.⁷²

2. Bell Atlantic⁷³

In building out its communications plant, Bell Atlantic, without notice to cable operators, is moving cable operator facilities and thereby putting them into violation of the National Electric Safety Code ("NESC") and the pole agreement. This conduct continues despite cable operator protests and Bell Atlantic assurances that such conduct will be corrected. In addition, Bell Atlantic gives preferential construction standards to its own attachments, while denying cable the use of various plant construction devices including Illinois brackets, extension arms, or boxing. This preferential treatment allows Bell Atlantic to build far more economically than cable operators. A hearing on the matter is pending before the New Jersey Board of Regulatory Commissioners.⁷⁴

⁷²See Docket No. 5743 (Vermont Dep't of Pub. Serv. 1994).

⁷³Bell Atlantic has the following pending video dialtone applications: C&P Tel. Co., 8 F.C.C.Rcd. 2313 (1993) (Technical trial authorized); New Jersey Bell Tel. Co., 9 F.C.C.Rcd. 3677 (1994) (commercial authorization granted); In the Matter of the Application of New Jersey Bell Tel. Co., W-P-C-6838 (amended Sept. 13, 1994); In the Matter of the Application of C&P Tel. Co., W-P-C-6912 (amended June 16, 1994); In the Matter of the Application of Bell Atlantic Tel. Cos., W-P-C-6966 (filed June 16, 1994).

⁷⁴Suburban Cablevision v Bell Atlantic-New Jersey, Inc., OAL Docket No. CTV 6813-93, Agency Docket No. CC92090890 (New Jersey Board of Regulatory Commissioners, filed Sept. 9, 1992).

3. GTE⁷⁵

Shortly after launching its Hawaii video dialtone project, and approximately two weeks after the deadline expired for parties to file petitions to deny in its video dialtone application proceeding, GTE Hawaiian Tel increased its pole attachment rates by more than 60% from \$5.80 to \$9.32, and its duct rental rate by 550% from \$0.14 to \$0.91/foot. GTE's unlawful pole and conduit rates are subject to complaint proceedings pending before the Commission.⁷⁶ GTE has inflicted a number of abuses against cable operators including permit processing delays (in at least one case for more than three years)⁷⁷ and has caused significant damage to cable lines placed in GTE conduit, affecting service to hundreds of cable subscribers and in some circumstances requiring the replacement of cable operator facilities.⁷⁸

Oceanic Cable (Time Warner) which now is in competition with GTE in Hawaii not only in video transport, but in certain of GTE's traditional monopoly businesses, has been subject to numerous instances of anticompetitive conduct by GTE. Contrary to the

⁷⁵GTE has video dialtone applications pending in Hawaii (W-P-C-6958), California (W-P-C-6957), Florida (W-P-C-6956) and Virginia (W-P-C-6955).

⁷⁶Chronicle Publishing Company d/b/a Chronicle Cablevision of Hawaii v. GTE Hawaiian Tel. Co., Inc., PA 95-001 (Complaint filed Oct. 7, 1994); Jones Spacelink of Hawaii, Inc. v. GTE Hawaiian Tel. Co., Inc., PA 95-002 (Complaint filed Oct. 24, 1994); Chronicle Publishing Co. d/b/a Chronicle Cablevision of Hawaii v. GTE Hawaiian Tel. Co., Inc., PA 95-003 (Complaint filed Oct. 31, 1994); American Cable TV Investors 4, Ltd. d/b/a Sun Cablevision of Hawaii v. GTE Hawaiian Tel. Co., Inc., PA 95-004 (Complaint filed Nov. 4, 1994); Time Warner Cable d/b/a Oceanic Cable v. GTE Hawaiian Tel., PA 95-005 (filed Nov. 30, 1994).

⁷⁷American Cable TV Investors 4, Ltd., PA-95-004, Complaint ¶¶ 16-17.

⁷⁸Chronicle Cablevision of Hawaii, PA 95-003, Complaint ¶ 20.

business practices standing for the previous 23 years, GTE now (1) has denied pole permit applications when it had not done so in the past; (2) has begun denying overlash permission; (3) refused to pursue joint trenching arrangements; (4) imposed a \$1,600 permit processing fee; and (5) on October 10, 1994 rescinded already-granted approval for several permit applications and suspended actions on several others. In meetings between cable company officials and GTE, GTE officials made a number of assertions that provide the clearest recent evidence yet of LECs' intention to use their monopoly control over essential duct and conduit space to leverage competitive advantage over cable operators in both video and telecommunications services.

At one such meeting, in response to a cable operator inquiry regarding the abrupt change in GTE business practices toward cable, a GTE official stated that because "the nature of our business had changed and because we were now competitors, . . . an extra amount of care would be taken in looking at all future applications for either pole or duct rentals."⁷⁹ At that same meeting, that same GTE official informed the cable operator that "no applications of any type would be approved, unless [cable] could prove that a video or cable customer was at the end of the line."⁸⁰ At a subsequent meeting, GTE's regional director for network provisioning, in response to cable protests that the GTE pole and conduit rate increases would add approximately \$1 million in the cable operator's annual operating costs, concisely stated, "well, if you don't like it just tell us where we can pile up the cable after we

⁷⁹Time Warner Cable, PA 95-005, Affidavit of Norman P. Santos ¶ 26.

⁸⁰Id. ¶ 28.

pull it out."⁸¹ These comments clearly suggest a corporate policy, in violation of federal law both to limit cable operators to video-only services and to use their monopoly over poles and conduit to inflict competitive harm on cable.

4. Southwestern Bell⁸²

In 1990, Southwestern Bell ("SWB") unilaterally sought to change all of its pole attachment agreements in its five-state service area. Although the contracts authorize cable operators to deliver all lawful communications services, SWB distributed notices announcing that, henceforth, fiber facilities and those used for non-video services carried on cable systems would not be assessed the cost-based rental prescribed by Section 224. Instead, any attachments so used would be assessed a penalty rate of as much as \$120.00. The rate is higher than the tariffed costs of SWB dark fiber rental prescribed by the FCC, thus virtually assuring that telecommunications customers will be unable to economically obtain transport on competing cable systems. Although each state cable association protested the announcement, SWB still carries forward punitive rates for non video attachments, despite the FCC's decision in Heritage that such penalties are unlawful.

Moreover, for years, SWB has been artificially inflating its net cost per bare pole by adding a large negative net salvage value to its depreciation of and depreciation

⁸¹Id. ¶ 32.

⁸²While not yet filing for video dialtone authority, Southwestern Bell has made repeated statements regarding its intention to provide video dialtone in Richardson, Texas. See, e.g., Associated Business Wire (June 7, 1994). SWB recent actions are clearly an effort to hamper cable's delivery of non-entertainment communications services.

reserve for poles. This questionable accounting practice recently has boomeranged on SWB. Because actual retirements have so lagged the anticipated recovery level, the depreciation reserve in two of SWB's service states, Kansas and Oklahoma, now either are virtually equal to, or exceed, the pole investment account, leading to negative pole rents. On August 26, 1994, SWB petitioned the FCC to allow SWB to make a dramatic downward adjustment to its depreciation reserve, which would result in correspondingly dramatic pole rate increases.⁸³ By recovering anticipated negative net salvage, SWB, in effect, has created a positive (phantom) regulatory asset which it has been depreciating and on which it has been earning a return, both through pole attachment rents charged to cable operators, and charges to telephone ratepayers.

Rather than wait for the ruling that it had requested from the Commission, SWB immediately implemented its proposed fix into its pole rate calculations for *all* states throughout its service area, and sought to increase pole attachment rates imposed on cable operators by as much as 138%. As addressed in Section IV. A., below, SWB well knows that current pole rate enforcement mechanisms are inadequate to protect cable operators from this and similar abusive practices. SWB is attempting to profit from the regulatory lag in the processing of FCC pole complaints in order to drain cable operators of precious development capital at this critical juncture in the telecommunications industry.

SWB's unilaterally imposed and unlawful accounting practice currently is

⁸³See Public Notice, AAD 94-125, DA 94-1232 (Nov. 14, 1994).

subject to a complaint proceeding before the Commission.⁸⁴

IV. PROPOSED STANDARDS FOR VIDEO DIALTONE APPLICATION AND SERVICES

Continental and the other Pole Licensees believe that past and present utility conduct with respect to pole attachments and conduits, the certainty that such practices only will increase with video dialtone rollout and increased competition between cable, and the need to protect the Commission's and Congress's long-standing policies of encouraging broadband competition between the cable and telephone industries, require the Commission to adopt effective video dialtone-specific safeguards for pole and conduit attachments. As is evident from Sections II and III of these Comments, utilities have employed, and continue to employ, a number of tactics, ranging from subtle to flagrant, to delay cable operator service expansion and diversification. These utility practices are sure to become only more concentrated in this era of head-to-head competition through video dialtone and require adoption of the proposals set forth below.⁸⁵

⁸⁴See Texas Cable TV Ass'n et al. v. Southwestern Bell Telephone Co., PA No. 95-00 (filed December 16, 1994).

⁸⁵Proposed text for Commission rules embodying these proposals are included at Attachment 1.

A. FCC Approval of Video Dialtone Authorizations and Tariffs Should Be Granted Only in the Absence of Pole and Conduit Abuses

Continental and the other Pole Licensees believe that in order for the Commission to protect against pole and conduit abuses by video dialtone applicants and grantees, the Commission should condition grant of video dialtone authorizations, modifications, and tariff submissions on the applicant's or grantee's compliance with reasonable pole and conduit attachment rates and practices. Promulgation of a rule analogous to Section 63.57 for LEC channel lease-back to cable could provide meaningful protections to potential video dialtone system lessors/tenants, but would not provide adequate assurances to independent cable operators in video dialtone markets seeking to improve and expand their existing facilities and services. Adoption of the safeguards set forth herein, however, would provide the needed protections. One effective way for the Commission to check further spread of these abuses is through the application, application modification, and tariff process applicable to video dialtone operators. Commission adoption of the proposals set forth in this section would provide such essential safeguards.⁸⁶

⁸⁶ In the event that the Section 214 approval process as it applies to video dialtone applicants either is replaced or in any way amended, Continental and the other Pole Licensees urge the Commission to ensure that the measures recommended herein are included in any subsequent or amended video dialtone application, application modification or tariff approval rules subsequently promulgated.

1. The Video Dialtone Rules Should Prohibit VDT Operators from Attempting to Limit Use of Cable Operator Facilities and Cable Operator Construction and Service Expansion

Continental and the other Pole Licensees recommend that the Commission adopt regulations precluding the grant of any video dialtone authorization, amendment to an authorization, tariff, or tariff modification, if the video dialtone applicant or grantee imposes any rate, term, condition or practice which (1) distinguishes between fiber and coaxial conductors, (2) video or non-video services, or, (3) has the purpose or effect of impeding a cable operator's deployment of its facilities, including the establishment of unlawful pole attachment rates.

With respect to the first prohibition, the Commission and courts already have held that utilities are not permitted to distinguish between the types of services or the types of conductors to be attached to utility-owned facilities,⁸⁷ and Congress has consistently attempted to foster cable's development as a full broadband services provider.⁸⁸ Utilities thus are limited to ensuring only that the cable operator facilities attached to its poles and conduits are in compliance with applicable construction and engineering safeguards. Utilities have no right or power to limit, beyond such engineering and safety standards, either the kinds of facilities to be attached, or the kinds of services to be offered. Utility companies unchecked in their tendency to impose such requirements, will use their monopoly control of utility space to

⁸⁷Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192 (1992). The FCC decision was affirmed by the D.C. Circuit. Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C.Cir. 1993).

⁸⁸See Section II.B., supra.

exact unlawful competitive advantage over cable operators. Continental and the other Pole Licensees urge the Commission, through the authorization and tariffing process, to prevent them from doing so.

Under Continental's proposal, all video dialtone applicant/grantee practices, including the imposition of unreasonable pole and conduit rates, that have the purpose or effect of delaying cable facility deployment, and any video dialtone operator requirement that additional permits for fiber overlashes to existing strand be secured, would preclude the grant of video dialtone authorizations or modifications and tariff submissions until such requirements and practices were eliminated. These rules should be applicable to any cable operator operating in the telephone company's service area, not just in the video dialtone system's "experimental" service area. If a cable operator or other interested party within the applicable petition or comment period makes a substantial showing that the utility is engaging in any of these prohibited practices, the Commission shall delay grant of the video dialtone applicant's/grantee's requested Commission action until the matter has been remedied. This requirement will compel LECs with video dialtone interests to timely process permit and makeready applications, and otherwise deal with cable operators in all aspects of their relationship in good faith.

2. Video Dialtone Applicants and Grantees Must Serve Cable Operators With of All Video Dialtone-Related Filings

In addition, Continental and the other Pole Licensees recommend that the Commission adopt rules requiring telephone companies to serve copies of all video dialtone-related submissions on all cable systems within the state of operation, or proposed operation, of the video dialtone system on the date that such submissions are made to the Commission. Video dialtone applicants/grantees should be required to include in their certificates of service attached to all video dialtone-related submissions, that they have effected service of such materials on all cable operators within the state. This requirement will allow cable operators and other interested parties to raise any anticompetitive conduct of LECs with video dialtone interests to the Commission's attention and otherwise advance the public interest.

3. All Video Dialtone Submissions Must Contain a Sworn Certification that the Video Dialtone Operator is Not Engaging in Anticompetitive Practices Against Cable Operators

Finally, Continental and the other Pole Licensees recommend that the Commission amend its video dialtone rules to require that each video dialtone application, amendment and tariff submission be accompanied by a sworn certification executed by an officer or director of the video dialtone applicant/grantee, that the utility is not presently engaged, or shall not in the future engage, in the practices specified herein. This important requirement will require a video dialtone provider to stand by its assertions made under oath and compete vigorously with cable operators.

4. These Proposals Impose No Significant Regulatory Obligations on Video Dialtone

With the exception of the notice of filing provision, adoption of these video dialtone-specific safeguards on pole and conduit practices do not impose additional regulatory requirements on video dialtone applicants or grantees. The telco acts and practices specified above already have been decided by Congress, the Commission, and the courts to impose unreasonable conditions on cable television operators, and, in any event, their prohibition represents sound and accepted communications policy. With respect to the notice requirement, telcos only would be certifying to compliance with laws to which they already were obligated to comply. Assuming that the utility is acting in a lawful manner, this rule would impose no additional burden on the video dialtone provider. If any video dialtone applicant/grantee is not acting in conformance with these provisions, it would be precluded from offering video dialtone service until it has resolved the outstanding issues and come into compliance.

B. The Commission Should Amend Its Pole Attachment Rules to Protect Competition

Continental and the other Pole Licensees recommend that in addition to amending its video dialtone rules, the Commission should modify its pole attachment rules as a further check against video dialtone abuse of pole and conduit space. The current practice for federal regulation of pole and conduit attachment rates is for cable operators to review rates charged by utilities, and, if the rate does not comply with the Commission pole formula, attempt to negotiate a rate with the utility. If negotiation fails, the cable operator's recourse is

to file a pole attachment or conduit complaint with the FCC.⁸⁹ While this practice over the years has resolved a number of pole rate disputes, there have been considerable delays in recent years in the processing of pole complaints, and the mechanism clearly is inadequate in this time of head-head in-market competition between cable and video dialtone operators.⁹⁰

The perils and shortcomings of the existing pole complaint rules are clearly evident in Southwestern Bell's most recent efforts to impose its punitive unlawful rates on cable operators in its five-state service area. As set forth in Section III B.4., when SWB initially attempted the deep cut in its depreciation reserve it knew that its proposed accounting was sufficiently radical that prudence required securing advance Commission approval before attempting to implement it. However, after filing its Petition, SWB decided that rather than wait for a Commission decision, SWB would impose the new rate, not just on cable operators in the two states where it was facing the specific accounting problem, but on *all* operators in its entire five state service area. SWB clearly is attempting to use the regulatory lag time inherent in the processing of pole attachment complaints, in order to siphon vital cable operator resources at this time of critical service and network investment. Continental's and the other Pole Licensees' proposals provide much-needed safeguards to protect cable operators from these transparent attempts, like SWB's, to game the Commission's pole attachment processes.

⁸⁹47 C.F.R. §§ 1.1401-1.1415.

⁹⁰See n. 4, *supra*.

1. Telephone Company Violations Subsequent to Commission Approval Would Be Subject to an Expedited Pole Complaint Proceeding Under Part 1 Subpart J of The Commission's Rules

Continental and the other Pole Licensees urge the Commission to adopt specific rules requiring that if at anytime after grant of a video dialtone authorization, modification or tariff submission, a video dialtone applicant or grantee, engages in any of the practices proscribed herein, the telephone company then would be subject to an independent expedited pole/conduit complaint proceeding brought under Part 1, Subpart J of the Commission's rules. Under Pole Licensees' proposed pole rule amendments, pole and conduit complaints against video dialtone providers would be fast-tracked and pleading cycles shortened in order to minimize the competitive injury inflicted on cable by video dialtone providers' abusive conduct. To the extent that such complaint relates to a proposed pole or conduit rate increase, the Commission shall suspend the effectiveness of such rate increase until the matter is resolved.

Continental and the other Pole Licensees propose that respondents in pole and conduit complaint proceedings would be required to submit their substantive response to such expedited complaints within 10 days of the complaint's filing. Replies would be due 7 days after service of the response. Under Pole Licensees' proposal, the Commission then would be required to issue a final decision on the merits of the proceeding within 30 days of the close of the pleading cycle. Expedited processing of pole and conduit matters involving video dialtone operators is necessary in order to protect competition and consumer choice in the broadband video services industry.

2. The Commission Should Adopt Regulations Requiring All Video Dialtone Service Grantees and Applicants to Receive Advance Approval for All Pole and Conduit Rate Increases

Continental and the other Pole Licensees propose that all pole and conduit rate increases proposed by video dialtone operators be submitted to the Commission for advance approval. With the advent of head-to-head in-market competition between the two industries through video dialtone, the standard pole complaint proceeding is an insufficient check on utilities' attempted rate increases. Commission staffing and other constraints, including the heavy regulatory burden imposed on the Commission by reregulation of the cable industry, has made the current enforcement process mechanism increasingly lengthy, even where the cable and telephone industries are not in direct competition through video dialtone. Where direct competition, exists, the need for increased government regulation of telephone companies' pole and conduit rates and practices is required.

While Continental and the other Pole Licensees believe that it is appropriate for *all* utilities to receive advance approval before imposing new pole and conduit rates, such advance approval is absolutely *critical* for any pole or conduit rate proposed by a telephone company with a pending video dialtone authorization, application or tariff submission. All video dialtone applicants and grantees must be required to submit their proposed pole and conduit rates, with sufficient supporting documentation and other evidence necessary for the Commission to ascertain whether or not the proposed rate is lawful under the Commission's formula, as well as serve a copy of such submission on all cable operators in the state where such rate increase is sought. This submission should be made 120 days prior to the proposed

effective date of the new rates. Such applicants or grantees would be required to submit their proposed rates for advance approval for every state in which it possessed a pending video dialtone application or authorization.

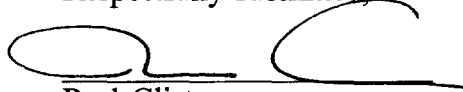
After submission of the proposed rate and supporting documentation, cable operators and other interested parties would have 30 days to file comments or petitions to reject the new proposed rate. Replies should be filed no later than 7 days after the date for filing comments or petitions to deny. The Commission, based on the submissions before it, then would set the appropriate rate for the following year, no later than 30 days after the deadline for filing replies. Any video dialtone applicant or grantee failing to follow the procedures instituted by these rules, would be precluded from instituting a new rate.

Continental and the other Pole Licensees believe that the institution of these new pole and conduit rate pre-approval procedures, and the expedited pole complaint proceeding, are necessary to ensure that video dialtone operators do not use their monopoly position over essential pole and conduit space to leverage unlawful competitive advantage over cable operators.

V. CONCLUSION

For the foregoing reasons, Continental and the other Pole Licensees respectfully request the Commission to adopt the measures proposed in these Comments and at Attachment 1.

Respectfully submitted,



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December 16, 1994

ATTACHMENT 1: TEXT OF PROPOSED RULES

The Commission should amend Part 63 of its Rules to contain the following rules.¹

A. GRANT OF VIDEO DIALTONE APPLICATIONS

(1) The Commission shall not grant a video dialtone authorization, amendment to an existing authorization or approve a video dialtone tariff or modification if the petitioning video dialtone applicant or grantee in any state:

(a) imposes any rate term or condition on a cable operator, or, engages in any other practice which has the purpose or effect of distinguishing between

(i) coaxial and fiber optic conductors, or (ii) video or non-video transmissions; or

(b) engages in any other practice which otherwise has the purpose or effect of impeding or delaying in any way a cable operator's deployment of fiber, non-video services, or any other facilities or services of the cable operator's design and choosing; or

(c) imposes any unlawful pole or conduit rate, as defined by Part 1 Subpart J of these Rules, or as defined by any State which has certified to the Commission under 47 U.S.C. § 224(c)(2) that it regulates the rates, terms and conditions related to pole attachments and conduit rental.

(2) If, in any Commission proceeding related to a video dialtone application, authorization, tariff submission, or any amendment thereto, a cable operator or other interested party makes a substantial showing within the applicable comment/petition

¹In the event of elimination or amendment to the Section 214 approval process applicable to video dialtone applicants and grantees, the Commission should include the measures proposed below in any subsequent video dialtone authorization and tariffing requirements.

period that the subject video dialtone applicant/license has engaged, or is engaging, in the practices proscribed in Section (A)(1), the Commission shall suspend processing of such application, authorization, tariff submission, or any amendment until the matters relating to such conduct proscribed in Section (A)(1) are resolved. To the extent that such matter relates to a proposed pole or conduit rate increase, the Commission, in addition to the other actions specified herein, shall freeze the effectiveness of such rate increase until the matter is resolved.

(3) A video dialtone application, application amendment and tariff submission shall contain a sworn certification executed by an officer or director of the video dialtone applicant/grantee that such video dialtone applicant/grantee is not presently engaging, nor in the future shall engage, in any practice proscribed in Section (A)(1).

(5) Notice to Cable Operators: A video dialtone applicant/grantee shall serve upon all cable all cable system operators in any state where such applicants/grantees offer or propose to offer video dialtone services copies of all submissions made in connection with its video dialtone application or grant, or any submissions related to any proposed pole or conduit rate increase (as set forth in (B)(1) (below).

* * *

The Commission should amend Part 1, Subpart J of its Rules to contain the following new Rule Sections.

(B)(1) Expedited Complaint Proceeding

(a) Any cable television operator injured by any unreasonable pole or conduit rate, term, condition, act or practice of a video dialtone applicant or grantee, including but not limited to, those set forth at Section (A)(1) herein, may file an expedited complaint under this Subpart.

(b) Such expedited complaint shall (i) be clearly identified as ~~such~~, (ii) set forth the specific facts, circumstances and conduct of the video dialtone applicant/grantee giving rise to the filing of the expedited complaint, and (iii) the specific relief requested, including equitable relief. To the extent that such expedited pole or ~~conduit~~ complaint relates to a rate increase, the filing of such expedited complaint shall suspend the effectiveness of such rate increase until the matter is resolved by the Commission.

(c) Respondents shall be required to file any substantive response to the expedited complaint no later than 10 days after the filing of such expedited complaint. Replies shall be due 7 days after the filing of any substantive response. In the event that no substantive response is filed, complainant shall be granted all relief requested in the expedited complaint.

(d) The Commission shall issue a final decision on the merits within 30 days of the close of the pleading cycle in any expedited complaint proceeding.

(2) Commission Approval of Pole and Conduit Rate Increases Required

(a) Any video dialtone applicant or grantee seeking to increase any pole or conduit attachment rate to be charged to cable television operators, must receive prior Commission approval before instituting any such rate increase.

(b) Such video dialtone applicant or grantee shall submit to the Commission, 120 days prior to the proposed effective date of the proposed new pole or conduit rate, those new rates, together with sufficient cost studies and other supporting documentation necessary for the Commission to ascertain whether or not such rate is lawful.

(c) Such video dialtone applicant or grantee shall serve, on the date of submission of such rate approval request, copies of such rate approval request on all cable operators in the state(s) for which such rate increase is proposed.

(d) After submission of the proposed rate and supporting documentation, cable operators and other interested parties shall have 30 days to file comments or petitions to reject the new proposed rate.

(e) Replies shall be filed no later than 7 days after submission of such comments or petitions.

(f) The Commission shall issue a decision either affirming or denying the proposed rate within 30 days from the deadline for filing replies.

(g) Any video dialtone applicant failing to comply with the procedures set forth herein, shall not be permitted to institute its proposed pole or conduit rate.

CERTIFICATE OF SERVICE

I, Elizabeth Johnson, do hereby certify that on this 16th day of December 1994, I have caused a copy of the foregoing to be served via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

*Commissioner Rachelle B. Chong
Federal Communications Commission, Rm. 844
1919 M Street, N.W.
Washington, DC 20554

*Chairman Reed E. Hundt
Federal Communications Commission, Rm. 814
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*Commissioner Susan P. Ness
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*Commissioner Andrew C. Barrett
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